INDEX.

	Page
Opinions of the Court	1
Statement of the case	2
What the issues were in the Indiana Supreme Court	2
Summary of argument	3
1. The educational system of the State of Indiana is reserved in the state's plenary power and cannot be exhausted by exercise nor delegated or alienated	3
2. The burden of establishing a contractual relationship created by statute is on the proponent of such relationship and the presumptions shall be against such contractual construction	3
3. The Indiana Tenure Statute did not create a legislative contract	4
4. If the Supreme Court of the United States should determine that the construction of the Tenure Statute of Indiana is within its purview, and that the state court was in error in deciding that said statute did not create a contractual right, then respondent should still prevail for the reason that if said statute was intended to create a contractual right to indefinite permanent tenure, then said intended contract fails for want of mutuality of consideration	5
5. The Supreme Court of Indiana has never construed the tenure rights under the Indiana Tenure Laws of 1927 to be contractual	6

6. Even if there is a conflict in the decisions of the Indiana Supreme Court on this subject, and even if such decisions are irreconcilable, it is not within the power or duty of this Court to resolve such conflict of decisions and announce a uniform rule to be deduced from such conflict of decisions, as the final determination of the law and policy of a state must be for the final determination by the State Supreme Court 7

7. If the Supreme Court should determine that the Indiana Teachers' Tenure Law of 1927 created a legislative contract with the teachers, we still urge that the Legislature could abrogate such a contract by virtue of the police power of the state... 7

8. A statute divesting the state's plenary powers must be strictly construed to divest no more power than is clearly and unconditionally intended..... 8

9. This Court has determined the question involved in the case at bar, there being no more rights created by the probationary period of employment being without written contract that when such employment is by written contract..... 9

Argument 10

Appendix A—Senate Bill No. 34 with journal entries and amendments 35

Appendix B—Indiana Teachers' Tenure Act of 1933, Indiana Acts 1933, p. 716..... 45

Appendix C—Constitution of Indiana, Article 8, Section 1 50

Appendix D—Baldwin's Indiana Statutes 1934, Sec. 5994 51

Appendix E—Baldwin's Indiana Statutes 1934, Sec. 5995 52

Appendix F—Baldwin's Indiana Statutes 1934, Section 5998 53

Appendix G—Baldwin's Indiana Statutes 1934, Section 5999 55

Appendix H—The New Jersey Act (as quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483) 56

Cases Cited.

Askam v. Board of Education of W. N. Y., 27 Sup. Ct. Rep. 483, 484 ..... 4, 16

Barbier v. Connoly, 113 U. S. 27, 28 L. Ed. 923 3

Bridges, Adm., v. Blake et al., 106 Ind. Sup. 332, 333 ..... 6, 23

Brumfield v. State ex rel. Wallace, 190 N. E. 863 7

Central Union Tel. Co. v. Ind'n'plis Tel. Co., 189 Ind. Sup. 210-224 ..... 3, 8

Clod Felter v. Hulet, 72 Ind. Sup. 137, 145 ..... 6, 22

Comley v. Board of Purchase and Supplies, 149 Atl., pp. 410-415 15

Coombs v. Getz, 285 U. S. 434-441 ..... 19, 20

Cyrus v. State, 195 Indiana 346 15

Dodge v. Board of Education, Vol. 58, No. 2, U. S. Sup. Ct. Rep., pages 98-100 ..... 3, 4, 9, 16, 32

Dworkins v. Caledonian Insurance Company, 226 S. W., pp. 846-850 15

Favorite, Adm., v. Stidham, 84 Ind. Sup. 423, 426 ..... 6, 22

Follet v. Sheldon, Treas., 195 Ind. Sup. 510, 144 N. E. 867 3

Fox River Co. v. Railroad Co. Comm., 274 U. S. 655.5, 7, 19
Good v. Martin, 95 U. S. 90.....6, 22
Grt. Northern Ry. Co. v. United States, 155 Federal Rep., pp. 945-959..... 3
Hagenback etc. Show Co. v. Randall, 75 Ind. App. 417-424 3
Hall et al. v. State Board of Assessment and Review, 58 Sup. Ct. U. S. No. 2, pp. 102, 104.....8, 24
Hall v. Delphi-Deer Creek etc., 189 N. E. 527..... 7
Holden v. Stratton, 198 U. S. 202, 25 S. Ct. 656..... 4
In re Miller, 74 Fed. Rep. (2nd) 86, 87..... 4
Jones v. Kerr, 5 N. E. (2nd) 533..... 4
Levy v. State, 161 Ind. Sup. 251, 258..... 8
McNaught v. Fisher, 96 Fed. 168.....6, 22
Moyer et al. v. Brand, 102 Ind. Sup. 301, 305.....6, 23
Musgrove v. D. E. Luther Pub. Co., 63 S. E. 53 54.....6, 22
Nebbia v. New York, 291 U. S. 502..... 8
Phelps v. Board of Education of W. N. Y., 57 S. Ct. 483 .....4, 5, 9, 16, 30
Ratcliff v. Dick Johnson Sch. Twnshp., 204 Ind. 525.. 4
Rowekamp et al. v. Mercantile etc., 72nd Fed. R., 2nd Series, p. 852 .....3, 17
Sauer v. New York, 206 U. S. 536, 546.....5, 7, 19
School City of Elwood et al. v. State ex rel. Griffith, 203 Indiana 626..... 13
S. H. Kress & Co. v. Johnson, 16 C. C. A. 32.....8, 23, 24
State ex rel. Lock v. Craig Schl. Twnshp., 5 N. E. (2nd) 632 4
U. S. v. U. S. Shoe etc. Co., 264 Fed. 138, 151..... 3, 9
Wilson v. School District of Philadelphia, 195 Alt., page 90, page 98..... 17
Witt v. Wilson, 160 S. W. 308, 310.....6, 22
Yard v. New Jersey, 95 U. S. 352, 354.....4, 16

Statutes Cited.

Baldwin's Indiana Statutes, Sec. 5994, 5995, 5998, 5999, 6003-6008 ..... 45, 51, 52, 53, 55
Constitution of Indiana, Art. 8, Sec. 1 ..... 3, 31, 50
Teachers' Tenure Act of 1927 10
Teachers' Tenure Act of 1933 ..... 13, 14, 35, 45

Textbooks Cited.

12 C. J., p. 912, Sec. 423 3
26 R. C. L., p. 162 3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 256.

STATE OF INDIANA on the Relation of
DOROTHY ANDERSON,
Petitioner,

vs.

HARRY BRAND, Trustee of CHESTER SCHOOL TOWNSHIP OF WABASH COUNTY, INDIANA.

RESPONDENT'S BRIEF.

I.

OPINIONS OF THE COURT.

(a) The first majority opinion of the Supreme Court of the State of Indiana is reported in 5 N. E. (2d) 531, Cause No. 26,560 (R. pp. 13, 14 and 15).

(b) The majority opinion of the State Supreme Court rendered upon petitioner's petition for rehearing is re-

ported in 7 N. E. (2d) 777, in the same cause (R. pp. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28).

(c) The dissenting opinion of Judge Treanor is reported in 5 N. E. (2d) 913 (R. pp. 31, 32, 33 and 34).

The official reports of these opinions have not yet been published.

STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case as correct, but will briefly repeat that petitioner sought by mandamus in the County or Circuit Court to compel her reinstatement as a permanent teacher under the terms of the 1927 Teachers Tenure Act of Indiana, which was repealed in 1933 and prior to the commencement of this action by the petitioner (repealed as to township teachers, and petitioner was a teacher in a township school corporation). Trial court sustained demurrer based on lack of right of action as predicated upon a repealed statutory right, which demurrer was sustained; petitioner refused to plead further and judgment was rendered against her. The Indiana Supreme Court affirmed the decision of the trial court.

WHAT THE ISSUES WERE IN THE INDIANA SUPREME COURT.

Respondent accepts petitioner's statement here.

SUMMARY OF ARGUMENT.

1. The educational system of the State of Indiana is reserved in the state's plenary power and cannot be exhausted by exercise nor delegated or alienated.

C. J., Vol. 12, p. 912, Sec. 423;
R. C. L., Vol. 26, p. 162;
Rowekamp et al. v. Mercantile etc., 72nd Fed. R., 2nd Series, p. 852;
Grt. Northern Ry. Co. v. United States, 155 Federal Rep., pp. 945-959;
Follet v. Sheldon, Treas., 195 Ind. Sup. 510, 144 N. E. 867;
Hagenback etc. Show Co. v. Randall, 75 Ind. App. 417-424;
Central Union Tel. Co. v. Ind'n'plis Tel. Co., 189 Ind. Sup. 210-224;
Barbier v. Connoly, 113 U. S. 27, 28 L. Ed. 923;
U. S. v. U. S. Shoe Co., 264 Fed. 138, 151;
Article 8, Sec. I, Constitution of Indiana;
Appendix C, page 50.

2. The burden of establishing a contractual relationship created by statute is on the proponent of such relationship and the presumptions shall be against such contractual construction.

Dodge v. Board of Education, Vol. 58, No. 2, U. S. Sup. Ct. Rep., pages 98-100:

> "The presumption is that such a law (tenure) is not intended to create private contractual or vested rights, but merely declares a policy • • •. He who asserts the creation of a contract with the state has the burden of overcoming that presumption."

Yard v. New Jersey, 95 U. S. 352, 354:

"The principle function of a legislature is not to make contracts, but to make laws. • • •

"Unless forbidden by some exceptional constitutional provision, the same authority that can make a law can repeal it."

3. The Indiana Tenure Statute did not create a legislative contract.

A. All sections of statute and related statutes must be read together to determine intent of Legislature and the requirement of annual contracts and distinction of terms of relationship of teacher from clause stating that teacher becomes a permanent teacher by executing a contract for further service shows that Legislature did not intend to create a contractual tenure right, but thus made such distinction between the legislative tenure rights and the contractual rights as to salary and services.

Appendix A-G, pages 35 to 55;
Phelps v. Board of Education of W. N. Y.;
Askam v. Board of Education of W. N. Y., 27 Sup. Ct. Rep. 483, 484;
Dodge v. Board of Education, 58 Sup. Ct. Rep. 98-100;
Ratcliff v. Dick Johnson Sch. Twnshp., 204 Ind. 525;
Jones v. Kerr, 5 N. E. (2nd) 533;
State ex rel. Lock v. Craig Schl. Twnshp., 5 N. E. (2nd) 632;
In Re Miller, 74 Fed. Rep. (2nd) 86, 87;
Holden v. Stratton, 198 U. S. 202, 25 S. Ct. 656.

B. The United States Supreme Court is bound by the construction of the State Supreme Court as to the con-

struction of a statute of the state and determination of legislative intent.

Sauer v. New York, 206 U. S. 536, 546;
Fox River Co. v. Railroad Co. Comm., 274 U. S. 655.

C. The United States Supreme Court shall only take cognizance of an issue on the application of a statute if the construction of the State Supreme Court brings such application within the purview of the contract clause of the Federal Constitution.

(1) If the Supreme Court determines that the construction of the state court brings the application of the Teacher Tenure Statute of Indiana of 1927 within the contract clause of the Constitution, then it shall give the application given it by the state court great consideration and weight and will only interfere therewith if palpably erroneous.

Phelps v. Board etc., supra:

> "Here those courts have concurred * * * did not become a contract entered into with the employees by the Board of Education. Unless these views are palpably erroneous we should accept them."

4. If the Supreme Court of the United States should determine that the construction of the Tenure Statute of Indiana is within its purview, and that the state court was in error in deciding that said statute did not create a contractual right, then respondent should still prevail for the reason that if said statute was intended to create a contractual right to indefinite permanent tenure, then said intended contract fails for want of mutuality of consideration.

A. Skill and ability may be held to be proper consideration for a contract, but, under the Indiana Tenure Law of 1927, the teacher offered no more skill and ability the sixth year (year tenure rights accrue) than she did the first five years of probationary employment.

(1) An agreement to do something that a person is already bound to do will not furnish consideration for a contract.

> Musgrove v. D. E. Luther Pub. Co., 63 S. E. 52, **54**:
> "a 'past consideration' is one which has served its purpose in former transaction, and it is not sufficient to support a contractual guaranty. Where such a contract is created subsequent to the main contract it must be supported by a new consideration."
>
> Witt v. Wilson, 160 S. W. 308, **310**;
> Good v. Martin, 95 U. S. 90;
> McNaught v. Fisher, 96 Fed. 168;
> Favorité, Adm., v. Stidham, 84 Ind. Sup. 423, **426**;
> Clod Felter v. Hulet, 72 Ind. Sup. 137, **145**;
> Moyer et al. v. Brand, 102 Ind. Sup. 301, **305**;
> Bridges, Adm., v. Blake et al., 106 Ind. Sup. 332, **333**.

5. The Supreme Court of Indiana has never construed the tenure rights under the Indiana Tenure Laws of 1927 to be contractual.

A. The previous decisions of said Court merely held that the tenure law did not change the contractual relationship of the teacher and school corporation in her employment, not becoming officers by virtue of their tenure.

B. The Indiana teachers' contracts provided, in effect, that the school corporation agreed to be bound by the terms of the Teachers' Tenure Act of 1927.

(a) Such a provision gave no more right than the statute itself, and the provisions of the statute would have been binding if no clause recognizing the act were placed in their contract or if no written contract was made.

(1) Such annual contracts expired annually and so with the rights thereunder.

Opinion in instant case;
Brumfield v. State ex rel. Wallace, 190 N. E. 863;
Hall v. Delphi-Deer Creek etc., 189 N. E. 527.

6. Even if there is a conflict in the decisions of the Indiana Supreme Court on this subject, and even if such decisions are irreconcilable, it is not within the power or duty of this Court to resolve such conflict of decisions and announce a uniform rule to be deduced from such conflict of decisions, as the final determination of the law and policy of a state must be for the final determination by the State Supreme Court.

Sauer v. New York, 206 U. S. 536, 546 (quotation in argument, page 19);
Fox River Co. v. Rr. Co. Comm., supra.

7. If the Supreme Court should determine that the Indiana Teachers' Tenure Law of 1927 created a legislative contract with the teachers, we still urge that the Legislature could abrogate such a contract by virtue of the police power of the state.

A. It is inimical to the public welfare of the people of the State of Indiana to limit the choice of re-employment of teachers.

(1) The security of permanent employment discourages progress and advancement of teachers by removing compulsion for such advancement and progress to retain em-

ployment, thus tending to produce lack of progress in education of children.

(2) Even inures to disadvantage of teachers by encouraging school corporation to discharge teachers at end of fifth year to prevent said teacher becoming a permanent teacher and producing instability of teaching staffs and organization thereof.

Levy v. State, 161 Ind. Sup. 251, **258**:

> "Those who assail a statute of this kind upon the ground that it is not a legitimate exercise of the police power be able to show that the act, etc., * * * or regulated **is not** injurious to the public, or likely to impair the public welfare."

S. H. Kress & Co. v. Johnson, 16 C. C. A. 32;
Nebbia v. New York, 291 U. S. 502;
Sauer v. New York, supra.

8. A statute divesting the state's plenary powers must be strictly construed to divest no more power than is clearly and unconditionally intended.

Hall et al. v. State Board of Assessment and Review, 58 Sup. Ct. U. S. No. 2, pp. 102, **104**;
Central Union etc. v. Indpls. Tel. Co., supra.

A. The Indiana Teacher Tenure Law of 1927 was only intended as a limitation of the authority of the township school corporation to cancel contracts, and not a complete surrender of the state's control over the policy of employment of teachers so as to bind future legislation.

B. Teachers' tenure acts are based upon the policy of protecting the educational interests of the state, and not a

policy of granting special privileges to teachers of a certain class.

Phelps v. Board of Ed. etc., supra;
Dodge v. Board of Education, supra;
Decision of Indiana Supreme Court in instant case.

C. A statute addressed to no particular person does not create a contract and therefore creates no vested right, and may therefore be repealed at any time.

U. S. v. U. S. Shoe etc. Co., 264 Fed. 138, 151.

9. This Court has determined the question involved in the case at bar, there being no more rights created by the probationary **period of employment** being without written contract than when such employment is by written contract.

Phelps v. Board etc., supra;
Dodge v. Board of Education, supra.

A. Both the New Jersey and Indiana Acts provide that continued service, after a probationary period of employment, gives the teacher an indefinite tenure of employment subject to cancellation for statutory causes.

Appendix B, page 45, Indiana Act;
Appendix H, page 56, New Jersey Act.

(1) There is no more virtue attached to contractual rights created by written contract than otherwise.

ARGUMENT.

Let us first observe what occurs between petitioner and respondent pursuant to the laws of Indiana relative to the employment of teachers. The employment was to be resolved into a uniform written contract specifying certain details of services to be rendered and salary to be paid and the length of the term of teaching. Said contracts were to be executed annually. Then, after the petitioner had served five consecutive years as a teacher in respondent school corporation and thereafter entered into a teacher's contract for further service, she thereupon became, by virtue of the 1927 act, a permanent teacher of the respondent school corporation.

We shall examine the 1927 Teacher's Tenure Act of Indiana. The statute says, "* * * who shall serve under a contract as a teacher * * * for five consecutive years, and who shall hereafter **enter into a teachers contract for further services** * * * shall thereupon become a permanent teacher * * *." Thus, we see that the Legislature distinguished between the contractual employment status and the tenure rights as a permanent teacher. The act did not provide that after five years of contractual service the school corporation shall enter into a written contract providing that said teacher shall be employed as a permanent teacher and said employment contract shall continue indefinitely subject to cancellation as directed in said act.

We do not admit that a statute providing for the execution of a permanent contract would prevent a permanent contract executed in pursuance of said statute from being affected by subsequent legislation on the subject of regulation of the school system of the state, but only point out the distinction in the Indiana tenure act to show that said

act did not provide for the execution of a permanent contract supplementary thereto. If the Legislature had so intended it could have said so—it did state specifically as to what the terms of the employment contract should be, covering all of the fundamental phases of a teacher's employment relationship with the school corporation. It does provide as follows, "upon the expiration of any contract between the school corporation and a permanent teacher, such contract (the contract made the sixth consecutive year of service), shall be deemed to continue in effect for an indefinite **period** and shall be known as an indefinite contract." Although this clause of the statute is ambiguous in that it provides that upon the expiration of the contract it shall continue, inconsistent expressions, yet a sensible construction shows it means that at the expiration of the year term for which the sixth year contract provides (further indicating the annual basis of contracts) said contract as then executed shall remain in force indefinitely and shall be known as an indefinite contract; thus, when the term "contract" is used throughout the statute it refers to this last contract which is to continue indefinitely from year to year by virtue of the tenure statute and the term "contract" as used in the statute does not refer to the permanent tenure right granted in the first part of the act. Thus, while the employment relationship is contractual and rests upon mutual consideration, the tenure rights or the right to the continued enforcement of such contractual rights are a creature of the statute and dependent upon the license or grant of said statute.

Putting it another way, as long as the legislative grant existed, the contractual employment right and the tenure right ran along together, the employment relationship's continuance dependent upon the tenure grant, otherwise

the last contract referred to would expire as the statute says.

The statute, in effect, said—but for the legislative grant the Legislature gives, the teacher contract entered into the sixth consecutive year would expire at the end of that school year the same as the other five previous consecutive years, showing that the Legislature intended that the continuation of the employment contract should be dependent on the legislative license or grant.

Compare this with the New Jersey teachers tenure act which the petitioner attempts to distinguish from the Indiana tenure law. That act provides that after three consecutive years of employment, which certainly is a contractual relationship as sacred as if created by the written contract as under the Indiana law, and that employment or relationship between the employing corporation and the teacher shall continue thereafter indefinitely during good behavior and efficiency and cannot be discharged except for stated causes provided in the act. Once the contract of employment is entered into whatever vested rights may accrue therefrom are the same, be the contract written or oral. Thus, there is no fundamental difference between the Indiana and the New Jersey tenure laws. Each limits the right of employing school corporation to terminate the employment relationship of teacher and school corporation after a probationary period of employment, except for certain statutory causes.

The only distinction claimed by the petitioner is the requirement of a written contract of employment in the case of the Indiana act and the lack of reference or provision for a written contract of employment in the New Jersey act. What is the difference whether such employment is by written contract or oral contract? The rights obtained by the one are no more sacred than the other.

Clearly, in both cases, the legislation is intended for the purpose of the regulation of the policy of employment by school corporation as to the tenure of teachers employed, providing a limitation on the right to discharge teachers, providing the method of discharge, the causes therefor and the method of employment and was not intended as a term of a continuing contract of indefinite duration which the school corporation should enter into with the individual teacher.

The petitioner cites cases on the proposition that the employment relationship is contractual as distinguished from a public office or other relationship. We do not deny this, but nowhere do they cite an Indiana or federal decision holding that the indefinite right to the continuance in the employment relationship perforce a statute is contractual.

The quotation on page 31 of petitioner's brief from the School City of Elwood et al. v. State ex rel. Griffith, 203 Indiana 626, "the position of a teacher—not a public office, but an employment contract between the teacher, etc. The relationship remains contractual • • • under • • • a teacher tenure law • • •." This merely says that the tenure law does not change the employment relationship as contractual, but does not hold that the tenure right to the continued enforcement of such contractual relation is contractual.

If the petitioner seriously urges the matter of construction or intent of the Indiana Legislature relative to the repealed tenure rights, we are willing to look into the record on that subject as shown in the copy of the record of the Senate and House Journals of the legislative proceedings during the discussion and enactment of the 1933 Indiana Tenure Act as set out in Appendix A on page 35. Section 5 of the act as originally passed by the Senate of the Indiana General Assembly reads as follows:

"Section 5. That section 6 of the above entitled act be amended to read as follows: Section 6. Nothing contained in this act shall be so construed as to affect the contract or the legal status of any teacher who, at the time of the passage of this act, has become a permanent teacher, under the terms and conditions of the act of which this is amendatory, but such teacher shall be and remain a permanent teacher, under the terms of such contract, as he would have done if this act had not been passed. This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled 'An act concerning teachers' contracts and providing for the repeal of conflicting laws.'" (Stricken in final passage.)

The act as **passed by the Senate** would clearly indicate a distinction between the tenure rights and the contractual rights in that said section referred to contract or the legal status of any teacher, the "or" being a conjunctive or meaning "and," and the additional qualifications stating that who has become a permanent teacher, and the closing phrase of that sentence, "as he would have done if this act had not been passed." In other words, the Legislature understood that the repeal of the Teachers' Tenure Act of 1927 as to township teachers would have terminated those rights unless saved, otherwise, it would not have been necessary to have considered the enactment of the above saving clause.

By reading the journal entries (Appendix A, page 35) of the House it will be seen that the House of Representatives struck out the saving clause as passed by the Senate and by comparison with the act finally enacted it will be seen that such saving clause was stricken out, indicating clearly that the Legislature intended that the repeal of the 1927 Tenure Act by the 1933 Tenure Act was intended to affect teachers then on tenure.

The petitioner insists that the use of the word "contract" throughout the act is an indication of legislative intent to treat the tenure rights accruing under the 1927 Act as contractual. I believe that I have sufficiently clarified that point, yet on the question of the use of the word "contract" I submit that the Court is not bound to assume that technical words shall always be understood according to their technical import. In Dworkins v. Caledonian Insurance Company, 226 S. W., pp. 846-850:

> "That technical terms 'shall be understood according to their technical import,' on its face is mandatory. But it has been held to mean, and rightly so, that the context of the word may be regarded, and, if it shows other than a technical sense was intended the other meaning will be adopted."

And, further, Comley v. Board of Purchase and Supplies, 149 Atl., pp. 410-415:

> "The intent of the law-makers is the soul of the statute and a search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute."

And, further, in Cyrus v. State, 195 Indiana 346:

> "The objective to be kept in mind in construing the statute is to discover the intention of the legislature. The strict letter must yield to the obvious intent. While the intention of the legislature must be ascertained from the language used, yet, where the intention of the legislative body clearly appears from the language used, courts may restrict the general meaning of the words in order to accomplish the manifest purpose of the statute."

This Court in its recent decision recognized the difficulty of discussing tenure rights without involving contractual features in its discussion. Phelps v. The Board of Education of West New York; Askam v. Board of Education of W. New York, 57 Supreme Court Report 483. "The status of tenure teachers while in one sense contractual, is in essence dependent on a statute like that of the incumbent of a statutory office which the legislature at will may abolish."

The petitioner takes the position that the respondent is urging that the police power of the state justifies the abrogation of the contract. While it is true that the police power can be exercised to abrogate contract in certain instances, yet we do not believe that we need to stand on this proposition to prevail, and yet we submit that it is true exercise of the police or plenary power of the state in this case. Of course, we insist that there was no contract.

That the regulation of public schools is within the police power and plenary power; in fact, one of the first and foremost phases of public welfare is beyond dispute.

It is our contention that we could admit the legislative intent which the petitioner attempts to establish, that is, that the tenure right is a legislative contract, and still prevails. However, we contend that if it had been the intent of the Legislature to enact a law directing the school corporation to enter into a permanent contract creating a vested right therein so as to bind future legislation changing the state's policy of education, then said act would be invalid as an unwarranted and unlawful delegation of authority to the school corporation.

As held in Yard v. N. J., 95 U. S. 352, **354**, "The principal function of a legislative body is not to make contracts, but to make laws. * * *"

"Unless forbidden by some exceptions in a constitutional provision the same authority that can make a law can repeal it," and as held in a recent decision, Wilson v. School District of Philadelphia, 195 Atl., page 90—page 98: "The appointment of officers to guard a baseball park cannot be considered on the same plane as the determination of a teaching policy or system (apropos some of analogy in decisions cited by petitioner) * * *"

"The selection—mere matter of detail, * * * and not the surrender of an important power by the General Assembly," and also in the same decision on page 93: "It is a well-settled maxim that under our theory of the separation of powers of government, legislative, judicial and executive, the power of each branch must be preserved to it; the legislature cannot delegate its powers to an act law directly or indirectly to any body or governmental agency."

(Further on) "under a well balanced constitution, the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of these lines of separate government that the liberties of the citizen depends."

"This principle, though not expressly written in our Constitution, embodies its basic strength if it is to endure as our fundamental or basic power necessary to government and cannot be delegated."

In the case of Rowekamp et al. v. Mercantile etc., 8 Circuit Court of Appeals, Federal R., Second Series, page 852, in which the Court said:

> "There are certain inherent powers in the government to enact laws to protect order, safety, health and general welfare of cities. This power frequently referred to as the police power has been said to be as

broad as the public welfare. It is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens, and of which the state may not deprive itself. One state legislature cannot by an agreement bind itself or its successor not to exercise this attribute of sovereignty and all contracts whether made by the state itself, by its municipalities, or by individuals, are subject to be interfered with or otherwise effected by subsequent statutes enacted in the bona fide exercise of the police power, and such legislative acts are not within the contract clause of the constitution. Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 294; Griffith v. Connecticut, 218 U. S. 563, 31 S. Ct. 132, 54 L. Ed. 1151; Hudson County Water Company v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; W. Chicago St. R. Company v. Illinois ex rel. City of Chicago, 201 U. S. 506, 26 S. Ct. 518, 50 L. Ed. 845; New Orleans Gas-Light Company v. Louisiana Light & Heat Producing & Mfg. Company, 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516; Texas & N. O. R. Company v. Miller, 221 U. S. 408, 31 S. Ct. 534, 55 L. Ed. 789; Douglas v. Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. Ed. 553; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; New Orleans Gas Light Company v. Drainage Commission of New Orleans, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831; Butchers' Union Slaughter House & L. S. L. Company v. Crescent City Livestock & S. H. Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; Pennsylvania Hospital v. Philadelphia, 245 U. S., 20 S. Ct. 35, 62 L. Ed. 124; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 S. Ct. 531, 47 L. Ed. 887.

"What the statutes subsequent to act No. 83 F. 1917 enacted in the exercise of the police power. The legislature of the state has power to determine primarily what measures are appropriate or needful for the protection of the public morals, public health, or

public safety, subject to judicial review. This act (Section 2, page 369) recites that: 'The object of this act is the protection of the people,' " etc.

As to the relationship of this Court in this controversy the Court said in Sauer v. New York, 206 U. S. 536-546, S. Ct. 686, page 546:

> "This court does not hold the relationship to the parties of a state court. It was the duty of that court to ascertain * * * the law of New York and its determination of that law is conclusive upon this court."

The power of the Supreme Court as expounded by Marshall (6 Wheaton 264, 5 L. Ed. 257 * * *) and precluded altogether the thought that * * *, the judicial included any power to correct any possible errors of the state courts in the determination of the state law.

The same law which declares easements, etc., defines qualities and limits them. Surely such questions must be for the final determination of the state court, "The right * * * in all states * * *, and the decisions have been conflicting, and often in the same state irreconciliable in principles. The courts have modified or overruled their own decisions and each state has fixed * * *, by legislation or judicial decisions, * * * in accord * * * with its own view of the law and public policy.

"This court has neither the right nor the duty to reconcile these conflicting decisions or to reduce the law of the various states to a uniform rule * * *."

The above case is followed on the same proposition in Fox River Company v. Railroad Company Commission, 274 U. S. 655.

The petitioner places great stress and relies largely upon the decision of this Court in the case if Coombs v.

Getz, 285 U. S. 434-441. However, upon examination of that decision, it will be seen that there is clearly a contractual relationship between the creditors of the bank of which the defending directors were held to be liable as surety for the default of the officers of the bank by operation of a statute which was repealed before the suit was brought on such liability. As the Court said, "Although the latter (contractual liability pursuant to law) derives it from the former, it immediately acquired an independent existence competent to survive the destruction of the provisions which gave it birth." In that case private parties made an undertaking with all of the necessary attributes of a contract and in view of the statute making the directors responsible in effect as sureties on the obligation of one of the contracting parties. Thus, as the Court indicated there was a contract made, including all of the provisions of the statute involved, yet the contract itself was independent and did not depend upon the statute for enforcement and did not lack mutuality of consideration to make it enforceable. Hence the repeal of a statute which authorizes a contract cannot affect a binding agreement made pursuant to the statute. In the case of bar, the rights depended entirely on the statute for their enforcibility and could not have stood alone as a contract without the support of the statute, for want of mutuality.

The petitioner insists that to treat the teachers' employment contracts as contracts from year to year defeats the purpose of the Teachers' Tenure Act, that is, to secure a teacher in permanent employment, the purpose which the petitioner avows. However, we insist that the purpose was to prevent Trustees discharging teachers with changes in politics of the Trustees or for personal reasons, thus disrupting the teaching staffs of the schools and

disorganizing the educational system of the state. However, without regard to the purpose of the act, the holding that under the Tenure Act the teacher's contract is a year-to-year contract in nowise defeats the purpose of the act, for as long as the Legislature believes that such a policy is a wise policy the act is retained and the contract is continued to be enforceable from year to year permanently, by virtue of the Tenure Statute, witness the fact that the Legislature of Indiana has retained tenure of city and town teachers, they being employed by the same form of contract as the township teacher, which contracts the Supreme Court of Indiana has determined to be contracts from year to year, and it is not urged that the city teachers have lost anything by such construction.

On the question of the want of mutuality of consideration the respondent is willing to admit that a binding contract with mutual consideration is not invalidated by reason of said contract being cancellable at the will of one of the parties. In that case there is mutual consideration independent of the provisions of cancellation. However, it seems to us that the primary lack of mutualities is that there is no consideration moving from the teacher to the school corporation in return for the tenure rights. What single requirement is there on the part of the teacher more than she is already bound to before she became a tenure teacher? The petitioner cites cases holding that skill and ability are as much a consideration for contract as property or money, but the teacher is required to have all the skill and ability that would be required, in any event, in the first place, to secure her teacher's license; and, second, to secure her employment the first five years. What does she offer beyond that? Nothing. Then the only provision affecting both parties is the provision preventing the school corporation from discharging the

teacher, but allowing the teacher to quit at will upon giving notice and without any limitations of reasons for quitting her employment. The only conceivable method by which such agreement would be binding would be if these provisions were incorporated as a part of an otherwise binding contract based on mutual consideration. That the Legislature intended the tenure rights and the provisions for cancellation of employment contracts to be separate and distinguished from such employment contracts is too obvious for argument, whether those rights should be called contractual or otherwise. In other words, the contention of the petitioner that by legislative enactment and judicial construction, that a contract accrued with the Legislature binding such Legislature and other agencies of the state to continue her employment contract. This argument distinguishes the permanent right of enforcibility of the contract from the employment contract itself.

That a contract will not be supported by agreement to do that thing or things or furnish that which the contracting parties already are bound to do and furnish will not be adequate consideration for a contract is supported by numerous authorities.

Musgrove v. D. E. Luther Pub. Co., 63 S. E. 52, **54**:

> "a 'past consideration' is one which has served its purpose in former transaction, and it is not sufficient to support a contractual guaranty. Where such a contract is created subsequent to the main contract it must be supported by a new consideration."

Witt v. Wilson, 160 S. W. 308, **310**;
Good v. Martin, 95 U. S. 90;
McNaught v. Fisher, 96 Fed. 168;
Favorite, Adm., v. Stidham, 84 Ind. Sup. 423, **426**;
Clod Felter v. Hulet, 72 Ind. Sup. 137, **145**;

Moyer et al. v. Brand, 102 Ind. Sup. 301, 305;
Bridges, Adm., v. Blake et al., 106 Ind. Sup. 332, 333.

On pages 38 and 39 of petitioner's brief the argument waxes dramatic when he infers that the construction placed on that statute by the Indiana Supreme Court in effect dishonors the state by permitting the Legislature to mislead the teacher into believing that she had a contract when she had no contract. It is elementary that people entering into contracts are bound to know the law affecting such contracts and the legal import of the contract executed. I have never heard it proposed that a contract should be construed contrary to the law of the land because one of the contracting parties misunderstood, or might have misunderstood, the terms of that contract. An attempted contract or agreement could not be enlarged upon by the misunderstanding of one of the parties as to the legal effect of the provisions thereof. Assuming that the teacher had all of the qualifications necessary to continue to teach for five years and had continued to progress, conduct herself suitably to her position and was a successful teacher, no harm should come to her by reason of a repeal of the Tenure Statute. The repeal of that statute did not direct nor could it be presumed to have caused the township school corporation to cancel any of the employment contracts in force at the time of the repeal of such act.

For a very thorough discussion of the relative power of the Legislature in the field of regulatory police power and the decisions of the courts thereon, we believe the following case is worth consideration and we further on copy the pertinent parts thereof:

S. H. Kress & Co. v. Johnson, 16 C. C. A. 32.

The rest of petitioner's cases and arguments are based on cases where there was an attempted interference by the state of rights that were clearly property rights or contractual rights. The majority of the opinions cited were also involved in the attempted interference with private contracts and property in private affairs and not in the regulation of a governmental agency as the schools of the state and in the field that is clearly within the functions of the government, namely, the regulation of the educational system of the state.

The case of Hall v. Wisconsin, 103 U. S. 5, is the most nearly applicable Supreme Court decision. However, in that case we again have a decision wherein a binding contract not lacking in mutualities was executed and performance begun before the repeal of the statute authorizing the contract. In this case as in Coombs v. Getz, a binding contract was executed pursuant to the authority of the statute authorizing employment of the engineers, and said contract became independent of the legislative authority from which it sprung and dependent on the consideration in the contract alone for its enforcement and was no longer dependent upon the statute for enforcement and thus, of course, the repeal of the statute from which it was born would have no effect on the contract.

Going into the question of the exercise of the police power of the state and the degree of injury to the public to authorize its exercise, I wish to call the Court's attention to the case of S. H. Kress & Co. v. Johnson, 16 C. C. A. 32:

> "While there was a sharp conflict in the opinion of the experts in the field of health, hygiene, and sanitation, there is substantial evidence that the require-

ment of a separate room will tend to promote and protect the public health. Had the same evidence been before the legislature it could have found either way on the issue and its finding would have been supported by substantial evidence.

"Furthermore, despite the opinions of experts to the contrary, we regard the requirement, that restaurants as defined in the statute be conducted in a room separate from the room or rooms in which other departments of a business establishment are conducted has a reasonable relation to the public health. Such a room can more readily be kept clean and sanitary; it can be kept more free from dust, germs, and flies; and a less number of persons will enter the room than will enter the general business establishment. There will be less of sneezing and coughing therein which all the experts admit may contaminate food. Persons entering a dining room are more apt to be careful of the welfare of others than they would be in a general business establishment.

"Such being the fact what is the province and duty of the court in the premises?

"In the Standard Oil Company v. Marysville, 279 U. S. 582, 49 S. Ct. 430, 431, 73 L. Ed. 856, the court said:

> " 'We may not rest in the balances of judicial review the weight and sufficiency of the fact to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance would be burdensome.'

"In Bordens Farm Products Company v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453-456, 80 L. Ed. 669, the court said:

> " 'In the light of the facts found, the legislature might reasonably have thought trade conditions existed justifying the fixing of the * * *.

Judicial inquiry does not concern itself with the accuracy of the legislative finding but only with the question whether the same lack any reasonable basis as to be arbitrary.'

"In Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 585, 76 L. Ed. 1167, the court said:

" 'When the **subject lies within the police power of the State**, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment.'

"In Radice, New York, 264 U. S. 292, 44 S. Ct. 325, 326, 68 L. Ed. 690, the court said:

" 'Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect to it against the opinion of the lawmakers. The state legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the findings are clearly unfounded, we are precluded from reviewing the legislative determination.'

"In Price v. Illinois, 238 U. S. 446, 35 S. Ct. 892, 894, 59 L. Ed. 1400, the validity of a statute prohibiting the sale of food preservatives containing boric acid was challenged. The court said:

" 'The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses;

that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so related in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided.'

"See, also, Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 56 S. Ct. 513, 80 L. Ed. 772. Counsel for plaintiff strongly rely upon Borden's Farm Products Company v. Baldwin, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281. While that case fully justifies the hearing of evidence in the instant case, the opinion that it is contrary to the principles above stated or which would justify us by weighing conflicting evidence on the issue decided by the legislature. Our sole inquiry is whether a rational factual basis for the legislative requirement is so wanting as to make it unreasonable and purely arbitrary.

"The burden of establishing the want of such a factual basis and that the statute is unreasonable and arbitrary is on the plaintiffs. Bordens Farm Products Company v. Baldwin, 293 U. S. 194, 209, 55 S. Ct. 187, 79 L. Ed. 281; Powell v. Pennsylvania, 127 U. S. 678, 684, 8 S. Ct. 992, 1257, 32 L. Ed. 253; Weaver v. Palmer Brothers Company, 270 U. S. 402, 410, 46 S. Ct. 320, 70 L. Ed. 654; Metropolitan Casualty Insurance Company v. Brownell, 294 U. S. 580, 584, 55 S. Ct. 538, 79 L. Ed. 1070. Plaintiffs have not met that burden. The most that can be said is that evidence leaves the question whether the provisions of the statute here challenged will promote and protect the public health,

fairly debatable. Such being the factual decision we cannot substitute our judgment for that of the legislature and say that the statute is unreasonable and arbitrary.

"Counsel for plaintiffs asserts the exceptions written into the act resulted in unreasonable and arbitrary classifications.

"When the classification made by the legislature is challenged, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification has the burden of showing by resort to common knowledge or other matters which may be judicially noticed or to other legitimate proof that the action is arbitrary.

"Bordens Farm Products Company v. Baldwin, 293 U. S. 194, 209, 55 S. Ct. 187, 79 L. Ed. 281; Race v. Van Deeman and Lewis Company, 240 U. S. 342, 357, 36 S. Ct. 370; 60 L. Ed. 679, L. R. A. 1917 A 421, Ann. Cas. 1917 B 455.

"But here again the scope of the judicial review is limited. If the evidence or conclusions drawn therefrom, leaves it fairly debatable as to whether there is a reasonable basis for the classification, the courts may not override the legislative determination. To warrant the court in holding that classifications offends against the Equal Protection Clause, the proof must show that the classification is wholly without any rational basis and is essentially arbitrary.

"Bordens Farm Products Company v. Baldwin, supra; Whitney v. California, 274 U. S. 357, 369, 47 S. Ct. 641, 71 L. Ed. 1095. Counsel say the exception as to soft drinks, ice cream or ices, and confections includes milk, and that of all foods, is most susceptible to contamination. But milk is kept in closed containers and is usually served directly therefrom to the customer at the counter or table. The place where

greatest care must be used is at the dairy and up to the point where it is sealed in the container. Thereafter it is reasonably safe against contamination and is not likely to become unwholesome, if the container is clean when filled, is kept sealed and proper temperature is maintained.

"It is urged that hotels, boarding houses and railroad dining cars may not be excluded by any rational basis of classifications. None of these engages in the sale of general merchandise and normally and customarily maintain separate dining rooms where only articles of food, drink, and tobaccos are sold.

"Furthermore, a statute does not violate the Equal Protection Clause merely because not all embracing. The legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest.

"Whitney v. California, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; People of State of New York ex rel.; Bryant v. Zimmerman, 278 U. S. 63, 73, 74, 49 S. Ct. 61, 73 L. Ed. 184, 62 A. L. R. 785; Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 56 S. Ct. 513, 516, 80 L. Ed. 722.

"We are of the opinion that plaintiffs failed to establish that the classifications adverted to are without rational basis and essentially arbitrary.

"Action of the legislature under police power and within the range of legislative discretion cannot be set aside because it is burdensome.

"Sproles v. Binford, 286 U. S. 374, 389, 52 S. Ct. 581, 76 L. Ed. 1167; Standard Oil Company v. Marysville, 279 U. S. 582, 586, 49 S. Ct. 430, 73 L. Ed. 856.

"With wisdom and expediency of the statute we are not concerned. Those are questions exclusively for legislative determination."

In conclusion let us see what the United States Supreme Court has said of the matter directly in issue. In the case

of Phelps v. Board of Education of W. New York, 57 Supreme Court Report 483, this Court said,

> "the position of the appellant is that by virtue of the Act of 1909, three years of service under contract confers upon an employee of a school district a contractual status indefinite in duration which the Legislature is powerless to alter or authorize the Board of Education to alter.
>
> "The Supreme Court holds that the Act of 1909 'establish a legislative status for teachers, but we fail to see that it established a contractual one that the Legislature may not modify. * * * the Statute of Tenure Teachers, while in one sense perhaps contractual is in essence dependent on a statute, like that of an incumbent of a statutory office which the Legislature at will may abolish, or whose emolument it may change.' "

And, further on, "here those courts have concurred in holding that the Act of 1909 did not amount to a legislative contract with the teachers of the state, and did not become a term of the contract entered into with employees by the Board of Education. Unless these views are palpably erroneous we should accept them." And, "we find nothing in the record to indicate that the board was bound by the contract with the teacher for more than the current year. The employee assumed no binding obligation to remain in service beyond that term. Although the Act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the contract of the board and not a term of a continuing contract of indefinite duration with the individual teacher." And in the first part of said decision the Court said, "the people of New

Jersey have ordained by their constitution that the Legislature 'shall provide for the maintenance and support of a thorough and efficient system of free public schools.'"

This decision could be taken over and verbatim applied to the law and the facts in this case. As set out in Appendix C, Article 8, Section 1, of the Constitution of Indiana, provided for the maintenance of free public schools and also contained therein the statement that schools are "essential to the preservation of free government"; and said constitutional provisions required that such school system be provided for and **regulated by law.** This is fundamentally the same as the provisions of the New Jersey Constitution. The contention of the petitioners in that case is exactly the same as the argument of the petitioner in this case and based upon a Tenure Statute which is essentially the same in all fundamentals. In New Jersey there was an employment contract annually for three years and a provision that after that time the employing authorities could not discharge except for statutory causes. And the Court said in the New Jersey case, "we find nothing in the record to indicate that the board was bound by contract with the teacher more than the current year." In the Indiana law and practice we find clear indications of the annual basis of contracts with teachers as to their employment under the Indiana statute using the exact words of this Court's decision, "the employee assumes no binding obligation to remain in the service beyond that term." And the statute in Indiana clearly indicated that lack of obligation by providing the method by which the teacher could quit her employment at the end of any one year. And our State Supreme Court used almost the same language that the United States Supreme Court uses in the above decision when it held that the Tenure Act was for the purpose of "limiting the power

of the local school officers to employ one in the place of a tenure teacher and required that tenure teachers be employed unless there was a necessary reduction in the number of teachers," and as pointed out in the original opinion, "The Legislature enacting school laws exercises one of the functions of sovereignty. The right to control public policy, in respect to the management and operation of school, cannot be contracted away by one legislature so as to fix a permanent public policy, unchangeable by succeeding legislatures." If there is still any question about tenure rights under the Indiana law being a regulation of educational policy rather than a contractual regulation, let us examine the most recent decision of this Court in Dodge et al. v. Board of Education of City of Chicago et al., U. S. Supreme Court Reports, Vol. 58, page 98; in that case there was some basis for consideration in that under the original tenure law of Illinois the funds accrued from teachers' contributions and gifts or legacies. And, also there was a direct expression in the statute directing the school board to pay a specific annual pension and a fixed sum and required the teacher to hold herself in readiness for certain services, which also could be a basis of consideration running from the teacher for the payment of such pensions.

In that case it is said "that the parties agree that the state may enter into contracts with citizens, the obligation of which the Legislature cannot impair by subsequent enactment. And they agree that legislation declaring a **policy** or regulation as subject to repeal." The respondent here agrees with both of these propositions. This Court says in the above decision that, "In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for a written execution of a contract on behalf

of the state, the case of an obligation binding upon the state is clear." The respondent takes solace in that statement. However, as previously clearly shown, the Indiana statute does not provide for the execution of a written contract on behalf of the state binding the state to employ the teacher indefinitely. And we think, as previously pointed out in our argument, that said contract, if it were to be executed on behalf of the state, would fail for the want of mutuality. And the Indiana Tenure Act is exactly what the Court referred to when it said, "This is true also of an act fixing the term or tenure of a public officer or **an employee of a state agency**. The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise."

These two decisions are more eloquent and decisive of the case at bar and all of the foregoing argument in respondent's brief. As was said in this last decision, "He who asserts the creation of a contract with the state in such a case has the burden of overcoming this presumption (the presumption stated by this Court in the last quotation above)." Thus, if there were some doubt as to the decision under the Indiana Tenure Law that doubt must be resolved as against the contractual construction of the statute, as urged by the petitioner, they being required to show it to the contrary beyond doubt to overcome said presumption of noncontractual construction.

Finally, the respondent contends that the Legislature of Indiana, in enacting the 1927 Teachers' Tenure Act of Indiana, did not, and did not intend to, create a contractual tenure with the teacher employed by the respondent subject to said Tenure Act, but was intended, and was, only a limitation upon the employment, re-employment and discharge of the petitioner. It further contended that

the Legislature could not have enacted a valid statute alienating its sovereignty by contracting with teachers in limitation of that sovereignty or plenary power so as to bind future legislatures. And that, aside from those two propositions, it's our belief that the police power would authorize legislation affecting contracts concerning educational system of the state, said contracts being made pursuant to police power of the state. Therefore, the Indiana Supreme Court should be upheld and their decision affirmed.

RAYMOND BROOKS,
N. Manchester, Ind.;
GEORGE C. GERTMAN,
Washington, D. C.,
Attorneys for Respondent.

APPENDIX A.

January 24, 1933. (Record.)

SENATE BILL NO. 34.

A Bill for an Act to repeal an act entitled "An act defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts," approved March 8, 1937, and all acts amendatory thereof and supplemental thereto.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That an act entitled "An act defining teachers and permanent teachers, providing for their employment and release, and defining, and providing for the making and cancelling of, indefinite contracts," approved March 8, 1937, and all acts amendatory thereof and supplemental thereto, by, and the same are hereby repealed.

Senate Motion.

Mr. President:

I move further consideration of Senate Bill No. 34 be indefinitely postponed.

Druley.

Note: Motion defeated, 35 to 11. January 24, 1933.

Senate Journal, date of January 30, 1933, Vol. I, page 270 ff.

Senate Motion.

Senators Egan and Druley offered the following motion:

Mr. President:

I move to amend Senate Bill No. 34 by striking out all of the said bill after the enacting clause and substituting the following in lieu thereof. Reference being had to the printed bill.

Amendment to Senate Bill 34.

(Schricker.)

Section 1. **Be It Enacted by the General Assembly of the State of Indiana,** That section 1 of the above entitled act be amended to read as follows: Sec. 1. That any person who has served or who shall serve under contract as a teacher in any school **city** corporation **or in any school town corporation or in any joint school corporation** in the State of Indiana for five or more successive years, and who shall **at any time** hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all **such** school corporations, and licensed assistant superintendents and superintendents of **such** school **corporations.** Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force unless succeeded by a new contract signed by both parties

or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation: and, Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract: and, Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year: Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption: **and, Provided further, That teachers contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.**

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in Section 1 of this act may be cancelled only in the following manner: Not less than thirty days nor more than forty days before the consideration by any **such** school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time and place where such consideration is to take place; and such teacher shall be furnished a written statement of the reasons for such consideration, within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipt by said teacher of notice of date, time and place of such consideration, be given such a hearing before the

school board **of such school corporation**; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days notice of the time and place of such hearing. Such teacher, at the hearing, shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony of witnesses and other evidence bearing upon the reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for the consideration of the cancellation of such contract; nor until after a hearing is held, if such hearing is requested by such teacher; nor until, in the case of teachers, supervisors and principals, the city or town **or joint school** superintendent shall have given the school corporation his recommendation thereon, and it shall be the duty of such superintendent to present such recommendations upon five days written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of such teacher's contract. Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a willful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons: Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination, as defined in

this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any **such school corporation**, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indefinite contract with a teacher after compliance with the provisions of this section: Provided, That the decision of the school board shall be final.

Sec. 3. That section 3 of the above entitled act be amended to read as follows: Sec. 3. No teacher shall be appointed to any **such** school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the **school** superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant: Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of additional authority in the selection and employment of teachers either by law or by the rules or regulations of any **such** school corporation.

Sec. 4. That section five (5) of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leaves of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leaves of absence as may be adopted by such corporation: Provided, That without written request any **such** school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability

or sickness: Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. **Nothing contained in this act shall be so construed as to affect the contract or the legal status of any teacher who, at the time of the passage of this act, has become a permanent teacher, under the terms of such contract, as he would have done if this act had not been passed.** This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled "An Act concerning teachers' contracts and providing for the repeal of conflicting laws."

(Amends Burns' Sec. 6967.1-6967.3; 6967.5.)

Egan and Druley, Senators.

Question is the adoption of the amendment.

The Egan and Druley amendment was adopted.

House Journal, Vol. II, date Feb. 24, 1933, Page 1119.

Special Order of Business.

Engrossed Senate Bill No. 34 being:

A Bill for an Act concerning Teachers and providing employment.

Representative Dill offered the following motion with amendment:

Mr. Speaker:

I move that Re-Engrossed Senate Bill No. 34 be amended as follows:

By striking out all of said re-engrossed Senate Bill following the enacting clause in lines 1 and 2 of Section 1, and inserting in lieu thereof the following:

That Section 1 of the above entitled act be amended to read as follows: Sec. 1. * * *

(This section is the same as Section 1 of the 1933 act.)

Sec. 2. That Section 2 of the above entitled act be amended to read as follows: Sec. 2. * * *

(This section is the same as Section 2 of the 1933 act.)

Sec. 3. That Section 3 of the above entitled act be amended to read as follows: Sec. 3. * * *

(This section is the same as Section 3 of the 1933 act.)

Sec. 4. That Section 5 of the above entitled act be amended to read as follows: Sec. 5. * * *

(This section is the same as Section 5 of the 1933 act.)

Sec. 5. That Section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the General Assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

Note: (This is the same as Section 6 of the 1933 act.)

And when so amended, said Bill do pass.

Dill.

The motion prevailed.

The bill with the accepted amendments ordered to engrossment.

House Journal, Vol. II, date Feb. 25, page 1140.

Bills on Third Reading.

Engrossed Senate Bill No. 34, being: A Bill for an act concerning teachers and providing employment.

The bill was read a third time in full.

The speaker stated that the question is, Shall the Bill Pass?

Those voting in the affirmative were:

Total number, 65.

Those voting in the negative were:

Total number, 18.

The bill was declared passed.

Senate Journal, Vol. II, date Feb. 27, 1933, page 1395.

Senate Motion.

Senator Schricker offered the following motion:

Mr. President:

I move that the Senate do not concur in the House amendments made to Senate Bill No. 34 and that a conference committee be appointed to confer with a like committee from the House on the questions in disagreement.

Which motion prevailed. (Senators Schricker and Druley were named by the President of the Senate to confer.)

House Journal, Vol. II, date Feb. 27, page 1185.

Message to the House.

Mr. Speaker:

I am directed by the Senate to inform the House that

the Senate has not concurred in House amendments to Engrossed Senate Bill No. 34 and that the President of the Senate has appointed Senators Schricker and Druley a conference committee to meet and confer with a like committee of the House on said Bill, and to report thereon.

Dick Heller,
Secretary of the Senate.

The Speaker appoints Representatives Dill and Wickersham.

House Journal, Vol. II, date of Feb. 27, pages 1201-1202.

Conference Committee Report.

Mr. Speaker:

Your Conference Committee, appointed to confer with a like committee from the Senate upon Engrossed House Amendments to Engrossed Senate Bill No. 34, respectfully reports that said two committees have conferred and agreed as follows, to wit: That the Senate do now concur in all House amendments made to said Engrossed Senate Bill No. 34.

Druley,
Schricker,
Wickersham,
Dill.

The House concurred in the report.

House Journal, Vol. II, date of Feb. 27, page 1209.

Message From the Senate.

Mr. Speaker:

I am directed by the Senate to inform the House that the Senate has concurred in conference committee report on House Bill No. 314 and Senate Bill No. 34.

Dick Heller,
Secretary of the Senate.

Bill as amended passed in the Senate and signed by the President on March 1, 1933, returned to House and signed by Speaker March 1, 1933, and delivered to Governor March 1, 1933. Held by Governor and delivered by him to Secretary of State on March 6, 1933, without his signature. Bill became law without signature of Executive.

APPENDIX B.

Indiana Teachers' Tenure Act 1933—Indiana Acts 1933, p. 716.

1934 Baldwin's Indiana Statutes 6003-6008.

(Bold-face type—additions to 1927 act. Small type in brackets—deletions from 1927 act.)

Teachers—Amendment—When to Become Permanent—Contracts — School Terms — Compensation — Salary Schedule—Uniformity of Contracts.

Section 1. Be it enacted by the general assembly of the State of Indiana, That Section 1 of the above entitled act be amended to read as follows: Section 1. That any person who has served or who shall serve under contract as a teacher in any (school corporation) **(school city corporation or in any school town corporation)** in the State of Indiana for five or more consecutive years, and who shall at any time hereafter enter into a teachers' contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term "teacher" as used in this section shall mean and include licensed public school teachers, supervisors and principals of all such public school corporations, and licensed assistant superintendents, and superintendents of such school corporations. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force

until such permanent teacher shall have reached the age of sixty-six years unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in section 2 of this act; Provided, That teachers' contracts shall provide for the annual determination of the date of beginning and length of school terms by the school corporation; and, Provided further, That teachers' contracts may contain provisions for the fixing of the amount of annual compensation from year to year by a salary schedule adopted by the school corporation and such schedule shall be deemed to be a part of such contract; Provided further, That such schedule may be changed by such school corporation on or before May first of any year, such changes to become effective at the beginning of the following school year; Provided, That all teachers affected by such changes shall be furnished with printed copies of such changed schedule within thirty days after its adoption; **(and, Provided further, that teachers ['] contracts shall be uniform and of the form and wording as prescribed by the state superintendent of public instruction.)**

Teachers—Indefinite Contract—Amendment—Cancellation —Time and Place of Hearing—Notice to Teacher—Statement of Reasons—Suspension of Teacher—Grounds for Cancellation—Board—Decision—Final.

Sec. 2. That section 2 of the above entitled act be amended to read as follows: Sec. 2. Any indefinite contract with a permanent teacher as defined in section 1 of this act may be cancelled only in the following manner: Not less than thirty days or more than forty days before the consideration by any such school corporation of the cancellation of any such contract, such teacher shall be notified in writing of the exact date, time when and place where such consideration is to take place; and such teacher

shall be furnished a written statement of the reasons for such consideration within five days after any written request for such statement; and such teacher shall, upon written request for a hearing, filed within fifteen days after the receipts by said teacher of notice of date, time and place of such consideration, be given such a hearing before the school board (in the case of cities and towns, and before the township trustee, in the case of Townships;) of such school corporation; such hearing shall be held not less than five days after such request is filed and such teacher shall be given not less than five days' notice of the time and place of hearing. Such teacher, at the hearing shall have a right to a full statement of the reasons for the proposed cancellation of such contract, and shall have a right to be heard, to present the testimony, witnesses and other evidence bearing upon reasons for the proposed cancellation of such contract. No such contract shall be cancelled until the date set for consideration of the cancellation of such contract; nor until after a hearing is held if such hearing is requested by said teacher; nor until, in the case of teachers, supervisors, and principals, the city or town superintendent shall have given the school corporation his recommendations thereon, and it shall be the duty of such superintendent to present such recommendations upon five days' written notice to him by such school corporation. Nothing contained in this section shall prevent the suspension from duty of any teacher pending a decision on the cancellation of **such teacher's contract.** Cancellation of an indefinite contract of a permanent teacher may be made for incompetency, insubordination (which shall be deemed to mean a wilful refusal to obey the school laws of this state or reasonable rules prescribed for the government of the public schools of such corporation), neglect of duty, immorality, justifiable decrease in the

number of teaching positions or other good and just cause but may not be made for political or personal reasons; Provided, That when the cause of cancellation of an indefinite contract is immorality or insubordination, as defined in this act, such cancellation shall go into effect at once; and, Provided further, That when the cause of cancellation of an indefinite contract is not immorality or insubordination as defined in this act, such cancellation shall go into effect at the end of the school term following such cancellation. The school board of any such school corporation, by a majority vote, evidenced by a signed statement in the minutes of the board, may cancel an indefinite contract with a teacher after compliance with the provisions of this section; Provided, That the decision of the school board shall be final.

Teachers—Condition Precedent to Appointment and/or Making Permanent—Amendment—Superintendent—Statement—Contents—Proviso—Act Construed.

Sec. 3. That section 3 of the above entitled act be amended to read as follows: Sec. 3. No teacher shall be appointed by any such school corporation in Indiana, and no teacher shall become a permanent teacher in any such school corporation, until the school superintendent shall have made a report upon such teacher's preparation, experience, and license, and it shall be the duty of every such superintendent, within ten days after request, to make such report upon any person whom the school corporation is considering as an applicant; Provided, That nothing contained in this section shall be deemed to prevent the granting to any superintendent of **additional authority** in the selection and employment of teachers either **by law** or by the **rules** or **regulations** of any such school corporation.

Leaves of Absence—Periods of—Reasons for—Amendment—School Corporation—Proviso—Right to Hearing.

Sec. 4. That section 5 of the above entitled act be amended to read as follows: Sec. 5. Any such school corporation, upon written request, may grant leave of absence, for periods not exceeding one year, to any permanent teacher for study or professional improvement or because of physical disability or sickness, subject to such rules and regulations governing leave of absence as may be adopted by such corporation; Provided, That without written request any such school corporation may place a permanent teacher on leave of absence for periods of not exceeding one year because of physical or other disability or sickness; Provided, That such teacher shall have a right to a hearing on such unrequested leave of absence in accordance with the provisions for hearings contained in section 2 of this act.

Amendment—Act Construed.

Sec. 5. That section 6 of the above entitled act be amended to read as follows: Sec. 6. This act shall be construed as supplementary to an act of the general assembly, page 195, Acts 1921, entitled "An act concerning teachers' contracts and providing for the repeal of conflicting laws."

APPENDIX C.

The Constitution of the State of Indiana, Article 8, Section 1.

Sec. 1. Common Schools.—Knowledge and learning, generally diffused throughout a community, being essential to the preservation of free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement; and to provide, by LAW, for a general and uniform system of Common Schools, wherein tuition shall be without charge, equally open to all.

APPENDIX D.

Baldwin's Indiana Statutes 1934, Section 5994.

Section 5994. Employment of teachers.—That after the passage of this act it shall be unlawful for any township trustee to contract with any teacher to teach in any common school, if the actual term of service of such teacher under such contract does not begin before the expiration of the term of office of such trustee. Every contract made in violation of the provisions of this section shall, as to the township represented by such trustee, and the school fund thereunto belonging, be absolutely void, but such trustee shall be personally liable to such teacher for all services rendered under such contract and for all damages which he may sustain by reason thereof (1893, p. 34, Sec. 1).

APPENDIX E.

Baldwin's Indiana Statutes, 1934, Section 5995.

Section 5995. Written contracts with teachers.—All contracts hereafter made by and between teachers and school corporations of the State of Indiana shall be in writing, signed by the parties to be charged thereby, and no action shall be brought upon any contract not made in conformity to the provisions of this act (1899, p. 173, Sec. 1).

APPENDIX F.

Baldwin's Indiana Statutes 1934, Section 5998.

Section 5998. Daily wage of teachers—Minimum per school year.—The daily wages of teachers for teaching in the public schools of the state shall not be less in the case of beginning teachers, than an amount determined by multiplying four and one-fourth cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience for one school year of not less than six months, the daily wages shall be not less than an amount determined by multiplying four and three-fourths cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of three or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying five and one-half cents by the general average given such teacher on his highest grade of license at the time of contracting. For teachers having had a successful experience of five or more school years of not less than six months each, the daily wages shall be not less than an amount determined by multiplying six cents by the general average given such teacher on his highest grade of license at the time of contracting. All teachers now exempt from examination shall be paid, as daily wages for teaching in the public schools, not less than an amount determined by multiplying six and one-half cents by the general average of scholarship and success given such teacher: Provided, That the grade of scholarship accounted in each case be

that given at the teacher's last examination, and that the grade of success accounted be that of the teacher's term last preceding the date of contract: And provided further, That two per cent shall be scholarship and success for attending the county institute the full number of days, and that said two per cent shall be added to the average scholarship of beginning teachers: Provided further, That the minimum paid to any teacher in the common schools of this state shall not be less than $800 per school year (1920, p. 194, Sec. 1; 1919, p. 768, Sec. 1; 1913, p. 104, Sec. 1; 1911, p. 131, Sec. 1; 1907, p. 146, Sec. 1).

APPENDIX G.

Baldwin's Indiana Statutes 1934, Section 5999.

Section 5999. Payment at less rate—Penalty.—If any school officer shall pay to any teacher for school services at a rate less than that fixed by this act, he shall be fined in any amount not exceeding $100.00 and shall be liable in a civil action for wages to such teacher at the rate provided in this act, which may be recovered by such teacher, together with an attorney's fee of $25.00, in any court of justice of competent jurisdiction (1907, p. 146, Sec. 3).

APPENDIX H.

The New Jersey Act (as Quoted in Phelps v. Board of Education of Town of West New York, 57 Sup. Ct. Rep. 483).

Section 1 (4 N. J. Com. St. 1910). The service of all teachers, principals, supervising principals of the public schools in any school district of this state shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing . . .

ERRATUM

FOR RESPONDENT'S BRIEF

(Filed January 4, 1938

PAGE IV INDEX—Hall et al., State Board of Assessment and Review; should read; Hale et al., State Board of Assessment and Review and is cited on page 8 of brief only.

PAGE IV INDEX—16 C. C. A 32 should read; 16 Fed. Sup. page 5.

APPENDIX B page 46.

"Until such permanent teacher shall have reached the age of sixty-six years" should be in bold face type indicating that those words are added in the 1933 Teachers Tenure Act and were not found in the 1927 Act.